Office-Supreme Court, U.S.
FILED
SEP 17 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VOLKSWAGEN OF AMERICA, INC.

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (JOAN NOSSE, et al Individually and on Behalf of All Others Similarly Situated, Real Parties in Interest)

On Appeal From The Supreme Court of California

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
INDEX TO APPENDICES	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
I. The Issue Of Proper Notice Under Due Process Standards Is Clearly Raised, Reviewable Now, and Properly Appellant's To Present To This Court	1
II. The Permanent Character Of The Deprivation At Issue Was Established And Preserved Before The Trial Court And Acknowledged By The Trial Judge. If Any Presumption Is Appropriate Here, It Must Be Against Appellees	4
CONCLUSION	6

INDEX TO APPENDICES

	Page
A Memorandum Of Points And Authorities In Support Of VWOA's Motion For An Order Regarding Named Plaintiffs' Financial Capabilities	1a
B Transcript Of Proceedings In The Superior Court Of California, County Of Francisco On April 6, 1983	5a

TABLE OF AUTHORITIES

CASES: Page

Baker v. *Carr*, 369 U.S. 186 (1962) 3

Barr v. *Columbia*, 378 U.S. 146 (1964) 5n.7

Civil Service Employees Ins. Co. v. *Superior Court*, 22 Cal. 3rd 368 (1978) 4

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) ... 2, 3

In re Eric J., 25 Cal. 3rd. 522 (1979) 4

Hammerstein v. *Superior Court of California*, 340 U.S. 622 (1951) 5n.7

Mullane v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) 3

Oppenheimer Fund, Inc. v. *Sanders*, 437 U.S. 340 (1978) 2, 3, 5n.7

People v. *Vaughn*, 262 Cal. App. 2d 42 (1968) 5

Webb v. *Webb*, 451 U.S. 493 (1981) 1

Zablocki v. *Redhail*, 434 U.S. 374 (1978) 3n.3

STATUTES:

Cal. Evidence Code § 413 (West) 5

Cal. Evidence Code § 600(b) (West) 4

PRELIMINARY STATEMENT

This brief responds to appellees' "Motion to Dismiss Appeal (Or In The Alternative To Affirm The Judgment Of The California Court Of Appeal)" [hereinafter "Motion To Dismiss"].

Appellees' overriding contention is that the Questions Presented on this Appeal have not been properly raised below. (Motion To Dismiss, p. 2) This claim is not easily squared with their own statements before the Court of Appeal below:

> The Petition for Writ of Mandate filed herein contends that [appellant] has been deprived of due process by an order of Respondent Court ordering publication of a class action notice . . . and dividing the costs of such publication by a ratio of 3/4 to [appellant] and 1/4 to plaintiff class members.
>
> * * *
>
> . . . This Order followed substantial briefs[1] on all of the questions involved, and multiple hearings before the court on all of the various issues raised by the motion [regarding form, dissemination and cost of notice].

Opposition to Petition for Writ of Mandate (Jurisdictional Statement, pp. 29a-30a, 33a)

Appellees thus have virtually admitted that "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb* v. *Webb*, 451 U.S. 493, 496 (1981). As briefly demonstrated below, the record fully supports this view.

I. The Issue Of Proper Notice Under Due Process Standards Is Clearly Raised, Reviewable Now, And Properly Appellant's To Present To This Court.

On this appeal, appellant urges first that due process mandates individual notice to those class members whose names and addresses may be ascertained with reasonable effort.

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[1] Appellees' trial and appellate brief alone, insofar as they address the issues now before this Court, required 44 pages to reprint (Jurisdictional Statement, pp. 29a-47a; 58a-67a; 85a-99a).

(Jurisdictional Statement, p. i) Below, appellees consistently met this point on the merits, claiming that no notice at all is constitutionally required to any class members. (*E.g.*, Jurisdictional Statement, pp. 41a-46a) In this Court, however, appellees now assert that appellant has not shown that the names and addresses of any class members are in fact ascertainable. (Motion To Dismiss, pp. 4-5) As demonstrated below, the record is to the contrary.

At issue is appellant's computerized Vehicle Data File, discussed in the affidavit of John von Hollen, retail coordinator for appellant. (Jurisdictional Statement, pp. 81a-84a) Appellees note correctly that most of the names and addresses on file are not identifiable as those of class members. In so doing, however, appellees pointedly ignore Mr. von Hollen's sworn statement that ". . . class members who can be positively identified from [appellant's] Vehicle Data File are current California owners as to whom there has been no name or address change since May 7, 1979." Von Hollen Aff. (Jurisdictional Statement, p. 83a) Ascertaining the names and addresses of such persons requires only that the file be inspected and culled for qualifying entries. Whether accomplished manually or by computer, this task is far less burdensome than many found to meet the "reasonable effort" or "readily ascertainable" standard which appellant contends is constitutionally mandated here. *See, e.g., Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 166 n.5 (1974) [cross-tabulation of separate lists containing millions of names]; *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 359-360 (1978) [manual selection of records and punching of 300,000 cards for machine sort]. The record also shows that, regardless of their precise number, tens of thousands of such identifiable class members exist. Von Hollen Aff. ¶ 9 (Jurisdictional Statement, p. 83a) Appellant's first question presented is precisely supported by the record.

The lower court's order as to notice is clearly final for purposes of review in this Court. *Eisen* v. *Carlisle & Jacqueline*, *supra*, at 171-172. Accordingly, consideration of this issue at this time is in no way "premature". Appellees' innovative suggestion that the due process violation challenged here should first be perpetrated on an experimental basis (Motion to

Dismiss, pp. 6-7) should be rejected. This is particularly the case where the due process right in question is precisely the right to notification and opportunity to be heard and to present objections *in advance* of a binding order or judgment.[2] *Mullane* v. *Central Hanover Bank*, 339 U.S. 306, 314 (1950).

Lastly, appellant has full standing to raise the notice issue here. As in *Eisen* v. *Carlisle Jacquelin*, *supra*, appellant argues in favor of constitutional standards which its adversaries admit they may be unable to meet. (Jurisdictional Statement, pp. 63a, 99a) Regardless of whose judicial "rights" are technically at issue, appellant, the named defendant below, has a "personal stake in the outcome of the controversy." *Baker* v. *Carr*, 369 U.S. 186, 204 (1964). Appellees themselves have in fact quantified this stake at up to $26,000,000. (Jurisdictional Statement, p. 6a) Decisions in this Court exemplify and endorse a class action defendant's rights in such cases. In *Eisen* v. *Carlisle & Jacquelin*, *supra*, representative plaintiff and class action defendant were aligned precisely as are appellant and appellees here. The notice issue was briefed by the parties and addressed by this Court without a word from the parties or the Court on standing. More recently, in *Oppenheimer Fund Inc.* v. *Sanders*, *supra*, this Court has explicitly cautioned against discouraging a defendant "from advancing arguments entirely appropriate to the protection of his rights *or the rights of absent class members*." *Id.* at 360 (emphasis added)[3]

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[2] Indeed, the very notice to be given in this case specifically states that any class member who does not timely request exclusion in writing "will be bound by any judgment in this case, whether favorable or unfavorable." Class Notice ¶ 7 (Jurisdictional Statement, p. 9a). Appellees' representations that ". . . the California trial court's notice order does not purport to establish *in personam* jurisdiction over all persons in the named class" and "does not purport to bind absent class members for whom more direct notice may be provided" (Motion To Dismiss, p. 11) are inexplicable.

[3] *Zablocki* v. *Redhail*, 434 U.S. 374, 380 n.6 (1978), cited for the contrary view, is wholly inapplicable. In that action, this Court declined to consider a belated due process challenge to post judgment notice to members of the losing nominal defendant class of public officials in an injunctive action, where 1) the ruling sought in this Court could not affect the rights or

II. The Permanent Character Of The Deprivation At Issue Was Established And Preserved Before The Trial Court And Acknowledged By The Trial Judge. If Any Presumption Is Appropriate Here, It must Be Against Appellees.

Appellees contend that the cost-shifting at issue is "no more than a temporary deprivation." (Motion to Dismiss, p. 14)[4] This view is not shared by the court which ordered it. In open court and without objection or comment from appellees' counsel, the trial judge put the matter as follows:

> I am really troubled by what I am doing here and creating a situation where no matter what happens in litigation Volkswagen gets strapped with $60,000 or whatever it is going to be to send [notice] out. (8a)

In California, such an inference by a lower court is binding on appeal. Cal. Evid. Code § 600(b) (West); *In re Eric J.*, 25 Cal. 3rd. 522, 527 (1979). In addition, both the leading authority and the record below clearly support the lower court's understanding of its own actions.

In the leading decision on the very questions presented here, all members of the California Supreme Court specifically noted that many class action plaintiffs may not be able to afford notice costs. *Civil Service Employees Inc. Co.* v. *Superior Court*, 22 Cal. 3rd 362, 377, 382-383 (dissent) (1978). Accordingly, in the absence of evidence, appellees must be presumed unable to defray or reimburse the notice costs at issue.

Such presumption is especially appropriate where appellees have declared under oath their inability to pay such costs[5] and

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interests of the moving party, 2) the proferred issue had never been raised at any stage of the proceedings below, and 3) the issue was for practical purposes "academic." *Ibid.*

[4] Appellees do not dispute that "the record contains no showing whatsoever that appellees can defray or reimbruse appellant for the cost of notice." (Jurisdictional Statement, p. 5) Instead, they argue that they should be presumed able to pay these costs, thus transforming their imposition on appellant into a "temporary" or "initial" deprivation subject to lesser constitutional standards. (Motion to Dismiss, pp. 13-21, *passim*)

[5] Before the intermediate appellate court, appellees quoted their own relevant sworn declarations as follows:

then successfully resisted further inquiry into the matter (Jurisdictional Statement, pp. 32a-33a) Regardless of what may or may not be in the record now, appellees' role in withholding evidence of their financial capabilities should estop them here from speculations about post-judgment remedies or at the very least subject them to adverse inferences on the matter. Cal. Evid. Code § 413 (West); *People* v. *Vaughn*, 262 Cal. App. 2d 42, 45 (1968).

Moreover, the trial court's ruling that appellees' finances were irrelevant to the cost allocation issue (Jurisdictional Statement, p. 32a) necessarily refused appellant's request to avoid permanent deprivation by having appellees post a bond. Indeed, at oral argument the trial judge specifically referred to and rejected the very passage in appellant's papers which raised this matter. (2a-3a, and footnotes; 7a).[6] In these circumstances, appellant was under no obligation to make a superfluous motion for security repeating the very points already decided against it.[7] In light of the above, it can come as no surprise that the trial court itself understood that any notice

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> *Because of my limited financial resources* and the relatively small amount of damages which I personally am claiming in this action, *I am financially unable* to carry the burden of paying for notice to the class in this action. (Jurisdictional Statement, p.31a, (emphasis added)

In this Court, by contrast, appellees have described these declarations without citation or even reference to the language emphasized above. (Motion to Dismiss, p. 14).

[6] Once more, appellees' presentation of the record before the trial court (Motion to Dismiss, p.14, n.1) is incomplete. The relevant passage from appellant's moving papers and the full transcript of the relevant hearing are attached as Appendices A and B.

[7] The most appellees suggest is that appellant's reluctance to encumber the record with such a separate motion was a "tactical error." This Court's jurisdiction should not turn on such technicalities. See *Barr* v. *Columbia*, 378 U.S. 146, 149 (1964) and cases cited. In any event, any doubt as to the meaning of the lower court's actions may be resolved by simply continuing the cause to permit amplification of the record. *See, e.g., Hammerstein* v. *Superior Court of California*, 340 U.S. 622 (1951). *See also Oppenheimer Fund Inc.* v. *Sanders, supra* at 346 n.7 in which, as here, the issue of security for the costs at issue was apparently brought to the lower court's attention without a formal motion.

costs imposed upon appellant would be unrecoverable. (*See* p. 4, *supra*)

In short, despite appellees' ingenuity, the record cannot now be rewritten. The issues presented on this appeal have been raised, preserved, argued, recognized and ruled on from the trial court level on. This Court's jurisdiction is properly invoked.

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction of this appeal. In the alternative, review should be granted under 28 U.S.C. § 2301.

Respectfully submitted,

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APPENDIX

APPENDIX A

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IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
in and for the City and County of San Francisco

No. 780024

JOAN NOSSE, JERRY KANE, *et al.*
Individually and on behalf of all persons
similarly situated,
Plaintiffs,

v.

VOLKSWAGEN OF AMERICA, INC., *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VWoA'S MOTION FOR AN ORDER REGARDING NAMED PLAINTIFFS' FINANCIAL CAPABILITIES

Hearing Date: April 6, 1983
Dept.: Law and Motion
[To be heard by Court; do not refer to Commissioner.]

III. ARGUMENT.

A. Named Plaintiffs' Financial Responsibility And Their Ability To Pay For Notice Are Factors Which Must Be Considered Under The Authority Relied Upon By Plaintiffs.

Plaintiffs place central reliance on *Civil Service Employees Inc. Co.* v. *Superior Court* (1978) 22 Cal.3d 362, for their argument that this Court should shift all notice costs to defendant in this action (Noble Decl., ¶ 10). As plaintiffs themselves state in their memorandum in support of their motion for notice to the class (p. 15), that case "indicates that the trial court, at the notice hearing, is to consider [certain] factors * * * in determining who should bear the initial cost of notification." The factors identified in *Civil Service* include "the number of named plaintiffs and their financial responsibility" and "the ability of plaintiffs to make the initial outlay" (*Civil Service Employees Ins. Co.* v. *Superior Court*, supra, 22 Cal. 3d 362, 380 and fn.10).

See, also, *Cartt* v. *Superior Court* (1975) 50 Cal.App.3d 960, 974, fn.21; *Berland* v. *Mack* (S.D.N.Y. 1969) 48 F.R.D. 121, 131-132; and *Lamb* v. *United Security Life Company* (S.D.Iowa 1972) 59 F.R.D. 25, 38-43, identified by the *Civil Service* court as setting forth relevant factors to be considered. Each includes "[the class representatives'] financial responsibility" and "plaintiffs' ability to make the initial outlay" in their relatively short lists of relevant factors.* Two of those cases (*Cartt* and *Berland*, at pages cited above) also list plaintiffs' ability to reimburse defendant as a relevant consideration. The other case (*Lamb*, at p. 39) suggests, by inference, that plaintiffs' ability to post a bond for reimbursement is a relevant consideration.*

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*The other factors listed in those opinions are "apparent merit or lack of merit in the claim," "the defendant's desire * * * [for] *res judicata*," "the value of [named plaintiffs'] * * * holdings," and "cost of notice."

*In this connection, see, also Comment, "Cost Allocation in California Class Actions: (1976) 13 Cal.Western Law Rev. 65, which discusses (at pp.

Evidence considered in this connection has included the number of shares of stock held by named plaintiffs, and the fact that named plaintiffs gave no indiction that they were unable to bear the cost of notice (*Lamb* v. *United Security Life Company*, supra, 59 F.R.D. 25, 41). Another court considered the amount of money in a named plaintiff's savings account as evidence that plaintiff was not unable to advance the cost of notice (*Roth* v. *Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 625-626, 631). See also, *Cartt* v. *Superior Court*, supra, 50 Cal.App.3d 960, 965, where the court considered the named plaintiff's annual salary as indicative of her lack of ability to pay the cost of mailing. This is the nature of evidence sought by VWoA (see Noble Decl., Exh. A, pp. 3-13).

In addition, plaintiffs' ability to bear notice costs, and the extent of such ability, may be relevant to the determination of *type* of notice which should be ordered. See *Cartt* v. *Superior Court*, supra, 110 Cal.App.3d 960, 962, 965, 973.

The only evidence submitted by plaintiffs on these issues are declarations from each of the named plaintiffs stating, in identical and conclusory terms:

> "Because of my limited financial resources and the relatively small amount of damages which I personally am claiming in this action, I am financially unable to carry the burden of paying for notice to the class in this action" (Noble Decl., ¶ 10).

This is woefully inadequate. VWoA clearly must have the right to explore the foundation for this conclusion, as well as to develop other relevant evidence. This Court must have that information if it is responsibily and adequately to exercise its discretion under the authority relied upon by plaintiffs. Any order issued by this Court without consideration of such information would be subject to challenge under the very authority upon which plaintiffs rely.

80-81) bonding of notice costs as a potential means to avoid due process challenges to shifting notice costs and which discusses plaintiffs' ability to post a bond as a relevant consideration.

Plaintiffs should be ordered to appear at the offices of VWoA's attorneys within several days of the hearing on this matter and answer VWoA's questions on these subjects. (footnote omitted)

APPENDIX B

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
in and for the City and County of San Francisco
Before the Honorable Stuart R. Pollak
Department 3

No. 780 024

JOAN NOSSE, JERRY KANE, *et al.*
Individually and on behalf of all persons
similarly situated,
Plaintiffs,

v.

VOLKSWAGEN OF AMERICA, INC., *et al.*,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, APRIL 6, 1983

THE CLERK: Nosse versus Volkswagen of America.

MR. WEINER [Attorney for appellee]: Good morning, your Honor.

William Weiner appearing for the plaintiffs.

MR. GRAHAM [Attorney for appellee]: Gilbert Graham also appearing for the plaintiffs.

MR. CHAVEZ [Attorney for appellant]: Mark Chavez for the defendant, Volkswagen of America.

Your Honor, this is before the Court as a result of the refusal of the plaintiffs to submit to depositions concerning their financial responsibility.

The plaintiffs have taken the position in this case that any inquiry into their financial status or ability to bare the cost of notice is irrelevant.

In fact, the Supreme Court in the Civil Service case clearly indicated that—

THE COURT: I read that.

What do you think about my tentative.

MR. CHAVEZ: Your Honor, I think that we need a little further relief.

THE COURT: Why is that?

MR. CHAVEZ: Because the issue of their financial responsibility is relevant. It is going to have to be decided at some point by this Court when it decides how to allocate the cost of notice. And unless we are permitted to take discovery on this issue, or in the alternative an order is entered establishing that the— For the purpose of allocating the cost of the notice that the plaintiffs are financially responsible and are capable of bearing the cost of notice. Then there is not going to be a factual record before the Court when it decides how to allocate costs.

THE COURT: There's something very troublesome about what you are trying to do here.

I mean, I am sympathetic with you to the extent that I don't think the plaintiffs can urge the lack of resources of these people and then hide behind—and not submit them to discovery and to the basis upon which they are saying it. On the face of it, we are dealing with consumers here, and whatever the particular financial condition may be of these individual plaintiffs, it strikes me that that will have little, if anything, to do with the proper manner of determining the way in which notice ought to be given, and who should pay for it. And certainly there are very strong countervailing considerations why these people shouldn't be subject to this kind of inquiry by reason of having filed the suit, it seems to me.

MR. CHAVEZ: Your Honor, it is our position that having assumed the—invoked the jurisdiction of this Court through class-action procedures, that the plaintiffs have assumed a certain burden and a certain obligation to the members of the class.

That moreover, your Honor, the issue of their financial responsibility is a factor to be considered in allocating the cost of notice.

Under the Civil Service case and cases which the Supreme Court has cited favorably in that decision, particularly Berland —

THE COURT: I saw that footnote. I read that case, and it is hard for me to believe that—that I am not quite sure what I am going to do with the costs and the notice. We will get to that when we get there.

If one of these plaintiffs happens to be a reasonably well to do person, imposing upon him what I guess you are estimating is 50, $60,000 of cost to give notice to the class, it would still be highly burdensome, to say the least, even if he had the ability to pay.

It seems to me much more important than the analysis of this individual's financial resources is an analysis of the amount of the claim in relationship to the costs involved and the number of parties to whom notice is going to be given, and so forth. And it just seems to me the answers to these questions about this person's financial resources are of really marginal relevance to a proper determination of what to do about notice.

MR. CHAVEZ: Well, your Honor, every court that has considered the issue of allocating notice has recognized that there's a due process concern with respect to imposing that cost on the defendant.

THE COURT: I am very sympathetic with it. When we get around to that hearing, I think that's a real problem.

I am really troubled about what I am doing here and creating a situation where no matter what happens in litigation, Volkswagen gets strapped with $60,000 or whatever it is going to be to send costs out. That's not a very happy result, and I am not quite sure what to do about it, but I can't really imagine that my answer to that question is going to be affected one wit by knowing how much money any of these plaintiffs happen to have in their bank accounts.

MR. CHAVEZ: But the rule the plaintiffs are advocating, your Honor, is that you can never conduct any inquiry whatsoever into their financial status based upon a bald assertion in one page declaration that they are financially incapable of bearing the cost of notice.

THE COURT: But they are going to have to withdraw that allegation. If they are going to rely upon the fact that these people can't afford to do it, then you're right. Then you are entitled to conduct discovery. On the other hand, if they are going to rely on the fact that that doesn't matter and these are individuals and this is a consumer class action and their financial position is irrelevant, then it is a different situation. If that is their position, then I don't think that these individuals ought to be subject to this kind of interrogation.

MR. CHAVEZ: Your Honor, it clearly is relevant, and you're going to have to address the issue of financial responsibility at some point when you determine how the costs should be allocated. And I believe that to make a reasonable decision on that issue, some discovery has to be taken to allow us to respond to their arguments that we should bear the entire cost of that notice.

MR. WEINER: Your Honor, I am rising only in the hopes of short cutting this argument, because you keep saying "if their position is," and we could indicate our position if the Court wishes; otherwise, I will let counsel continue.

THE COURT: Why don't you do that.

MR. WEINER: We understand your ruling. The way I understand it in following the Court's order, we do believe that the way you have expressed it is that if we don't do this. In light of that, what we're going to do is follow what the Court has suggested, or will order, and that is—just to make sure I understand—there are six pages of declarations, each one of one page from each of our plaintiffs.

THE COURT: I understand that also. Also, incidentally, just so you have a record, I don't believe the originals are in the file. I mean, I assumed that you intended to file them because you refer to them in a memorandum, but actually, I don't think they are in the file.

MR. WEINER: We will check that, your Honor.

At any rate, the six pages that are supposed to be in the file as originals—we have copies. I suspect counsel has copies?

MR. CHAVEZ: Yes, we have copies.

MR. WEINER: We will delete them literally from the motion by filing an addendum indicating that they should be deleted, if that suffices; and also in that addendum we will delete what I presume the Court means by reference to it, which I have read this twice this morning to make sure, and my understanding is that literally one sentence on page 14 of our memo regarding costs, which says the following: The named plaintiffs in this suit have indicated that they are financially unable to incur the cost of notice, footnote 12 and footnote 12 indicates the six declarations that I have just indicated. Otherwise, our basic argument is really, as the Court suggested, quite well for us, and that is it is irrelevant and, as we have said time and again in response to their motion to compel further responses.

THE COURT: I am not aware of any other references that would come within the scope of —

MR. WEINER: And in good faith, I have looked through it twice this morning and I find no others, because our main

thrust is, as the Court has indicated in a consumer cross-action case, it is irrelevant.

MR. CHAVEZ: Your Honor, I would like the opportunity to make a further review of their memorandum to see which portions do in fact make reference to their financial status, if I may?

THE COURT: Sure. You can do that. Call them if you find anything out.

It seems to me that it is the type of material that was just referred to that I am talking about. Anything that talks—refers specifically to these individuals' ability—and I distinguish that from any arguments that may be in there as to what burdens ought to be imposed upon consumers generally. Presumably, an individual consumer is less financially capable of bearing some financial burdens than companies the size of the defendant we're dealing with. We know that without looking at their banking account.

MR. CHAVEZ: May I address the relevance issue for a moment, your Honor?

THE COURT: Sure.

MR. CHAVEZ: I believe that under Burland and the other cases that the Supreme Court has cited, it is fairly clearly indicated that there are a number of factors the Court should consider in making an allocation of costs. And one of those—two of those factors directly relate to financial status, and they are the financial responsibility of the plaintiffs and their ability to bear the initial costs of notice.

If that is in fact correct, your Honor, then it is relevant what the financial worth of the plaintiffs is; and we have no way of knowing whether or not—and I am not saying they are—but we have no way of knowing whether or not these plaintiffs are independently wealthy.

THE COURT: I know. My feeling is this: That whatever relevance there may be, it is very, very marginal; and even if

an individual has $10,000,000, you know, he is a multi-millionaire, has lots of money, lots of assets, in determining how much costs he ought to be required to bear to give notice with respect to a claim where his maximum recovery is, let's say $200 or $300, the size of his bank account, is of very, very little relevance.

There are other factors that are relevant and have to be grappled with and which are not easy to resolve. But that particular aspect is of marginal relevance; and as against that marginal relevance is the substantial countervailing interests in what this would necessarily do to any consumer class action if this is the kind of interrogation that one has to subject themselves to.

There are all kinds of contexts in which courts are reluctant to open up one's financial affairs as the necessary price of bringing a lawsuit, except to the extent that it is really necessary to do it. And there are situations where it is necessary.

Here it is so marginal, and the burdens are so obvious, it seems to be substantial, but I just don't think there is any justification for it.

MR. CHAVEZ: Your Honor, if that independently wealthy person is able to—through invoking the rubric of a class action procedure—avoid bearing the cost of financing his own lawsuit and shift the burden of giving notice to the class, to the defendant, based solely upon a claim that this —

THE COURT: But he may not be able to do that. I may require these plaintiffs to bear some portion of the costs.

MR. CHAVEZ: Then how can the Court reasonably determine, or make a reasoned determination as to what portion they should bear?

THE COURT: By looking at factors other than how much he has sitting in his bank account.

I'm going to look at the amount of costs that are involved. I am going to look at the nature of the individual claims, and the

amount of people affected, you know, the strength of claims and other things. I just think that the size of his bank account is really virtually insignificant, and I am going to make certain assumptions, I suppose, as to the fact that plaintiff is in a position to—nobody is claiming the plaintiffs are impoverished, that they are indigent. They are consumers, and I think that says something. It says as much as we need to know in order to intelligently deal with how we should treat the costs.

MR. GRAHAM: Your Honor, may I inquire just as to the form. You want us to file revised declarations, or may we just prepare a court order that would indicate those particular situations?

THE COURT: I think a court order. You're not sending anything up to a jury here.

I think that is what I am going to do. I wrestled with this a little bit.

As I say, I don't know what I am going to do about costs. I think it is a real tough issue to be fair to everybody.

MR. CHAVEZ: I don't want to belabor the point, your Honor, but with respect to the consideration of the type of notice, it seems to me that we are in something of a logical bind here because in considering the type of notice that should be provided to the class, the Court of Appeal in Cart indicated that you should consider what the financial ability of the plaintiff is to bear that cost.

THE COURT: I guess another way to say what I said—I don't know if this means exactly the same thing or not—but it is this: I am going to make certain assumptions. If it comes out that I wind up entering an order imposing upon the plaintiffs more costs than they can possibly bear, then at that point they may choose to open up the issue and we will have to take a closer look at it. But I think at least in the first instance, if we can possibly approach the question without getting into this, we ought to do so.

MR. WEINER: Thank you, your Honor.